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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 103.

HARRY F. WAITE,

Petitioner,

vs.

THE UNITED STATES.

BRIEF IN BEHALF OF THE PETITIONER.

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HARRY F. WAITE,
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AGAINST

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Brief in Behalf of the Petitioner.

Citations Below.

This case has been reported in the Court of Claims as follows:

1. 57 Court of Claims 546 (Immaterial here.)
2. 63 Court of Claims 438. Decision of May 2, 1927, Rec., p. 9.
3. Court of Claims . Decision of Feb. 10, 1930, Rec., p. 27.
4. Court of Claims . Decision of Apr. 7, 1930, Rec., p. 33.

Jurisdiction.

Jurisdiction in this case to grant this petition rests upon the Act of February 13, 1925, Chapter 229, 43 Stat. 939; U. S. Code, Title 28, Section 288.

Facts.

1. This is a suit brought under the patent laws, and particularly Section 68 of Title 35, U. S. Code, Act of June 25, 1910, Chapter 423, 36 Stat. 851, as amended July 1, 1918, Chapter 114, 40 Stat. 705, to recover for infringement of Letters Patent No. 1,343,599, dated June 15th, 1920, for an X-ray system, granted on an application filed July 6th, 1917, by Harry F. Waite, the petitioner herein. The suit is an ordinary patent suit for the reasonable and entire compensation allowable in such cases (Rec., pp. 3 and 4.) The patent has been found valid and infringed (Rec., p. 21, fol. 21).

2. The claim of the patent in suit, the only claim involved, covers a peculiar transformer with three wires running therefrom and an X-ray tube known as the Coolidge tube with three connections for such wires, and for the purposes of this case the system embodying these features may be called the three wire system (Rec., p. 11, Finding 4). The transformers and connecting wires were manufactured and supplied by the Wappler Manufacturing Co. (Rec., p. 15, Find. 14 and p. 16, Find. 15, and p. 28, Find. 3) and the X-ray tubes, the well-known Coolidge tubes, were furnished by another manufacturer, The General Electric Co. The parts were assembled and tested by the respondent (Rec., p. 21, par. 3). The apparatus is suitable for battlefront conditions where men are to have the benefit of X-ray examination, as near the firing line as pos-

sible, and where an alternating electric current is available (Rec., p. 24).

3. The court below found that 101 infringing transformers were manufactured for the defendant and that a reasonable royalty, due because of the infringements, is $59.42 per transformer. Judgment for compensation was accordingly awarded in the sum of $6,001.42 (Rec., p. 30, Find. 9).

4. Although the government received these transformers and the Wappler contract was completed, on or before June 15th, 1922 (Rec., p. 28, Find. 3) the Court of Claims failed and refused to allow interest on the amount of reasonable royalties from that day (Rec., p. 33, fol. 30).

Assignment of Error.

The sole error complained of is the refusal of the court to allow interest on the amount of reasonable royalties from the time payment thereof should have been made.

The petitioner contends that interest at the rate of 6% should be allowed on the sum awarded, namely $6,001.42 from June 15th, 1922, to the date of final judgment in the case.

ARGUMENT.

POINT ONE.

Interest should be allowed in this case on the amount $6,001.42 from June 15, 1922, to the date of entry of final judgment.

A. The Wappler Company, the contractor, is not an ordinary contributory infringer and liable as a private party ordinarily would be, this case being different in this respect from the *Richmond Screw Anchor* case (275 U. S. 331). The respondent has not assumed the liability of its contractor.

In the *Richmond Screw Anchor* case, the contractor delivered *completed cargo beams, ready for use*, to the United States, and so was a direct infringer. In the case at bar, the contractor delivered transformers and wires, but not Coolidge tubes, they being obtained elsewhere. The claim in suit calls for three elements, namely, the transformer, the three wires and the Coolidge tube, which were assembled by the ~~petitioner~~ respondent. The United States, not the contractor, is here the direct infringer.

In the case of *William Cramp & Sons* v. *International* (246 U. S. 28) the respondent built complete turbines, installed them in ships and delivered them to the United States. In that case it was held that a patent owner had an option to sue either the contractor or the United States. In the *Marconi* case immediately following (246 U. S. 46) where the respondent manufactured parts only of wireless apparatus which were sent to the United States and assembled by it and used, it was found that he was neither a direct nor a contributory infringer and therefore not liable, and suit would lie against the United States, but not the contractor.

After the decision of these cases, the law was amended so as to eliminate the right to sue the manufacturer, but it did not change the law as applied in the *Marconi* case where the United States alone is an infringer. We submit that the court below misunderstood the law when it treated the United States as a private infringer as to this matter of interest.

B. If the respondent be treated as an ordinary infringer, the petitioner is entitled to interest according to the weight of authority, and no recent authority sustains the position below. The decision below is in direct conflict with all these authorities.

The Court of Claims allowed the plaintiff, in the suit at bar, $59.42 per transformer. This was based on the profit made by the Waite & Bartlett Company, the petitioner's corporation, when filling a government contract in 1917 and long before he had a patent. The court did not allow the profits made by the Wappler Company. It allowed what was, in its opinion, all things considered, a reasonable royalty. The cases on which the Court of Claims relied, namely, *Tilghman* v. *Proctor* and *Goodrich* v. *Consolidated*, do hold that interest will not be allowed on profits. The *Goodrich* case also holds that interest will be allowed on a reasonable royalty. See page 624. At a later date, the Circuit Court of Appeals for the Seventh Circuit, which decided this *Goodrich* case, reversed itself and did allow interest on profits. See the case of *Auto Pneumatic Action Co.* v. *Star Piano*, 12 Fed. (2d) 586, from which we quote the following, at the end of the opinion:

> "INTEREST. The master's report was filed June 23, 1924, but interest was allowed from August 2, 1921. By the defendant it is contended that it was error to allow interest until after the filing of the report. By the plaintiff

it is contended that interest should have been allowed from a much earlier date. There has been much controversy and considerable diversity of opinion upon the question of the allowance of interest on profits recovered in infringement cases. In the earlier cases, the Supreme Court of the United States proceeded upon the theory that profits were unliquidated damages and that interest was not allowable thereon. This court has held that the infringer is properly chargeable with interest from the end of the infringing period. *Goodrich* v. *Consolidated Rubber Tire Co.*, 251 Fed. 617, 624; *Malleable Iron Range Co.* v. *Lee*, 263 Fed. 896, 902. In *Miller* v. *Robertson*, 266 U. S. 243, 258, after a review of many cases, the court held:

> 'When necessary, in order to arrive at fair compensation, the court, in the exercise of a sound discretion, may include interest or its equivalent as an element of damages.' "*

So far as we are advised, interest is allowed on a reasonable royalty in all the Circuits where the matter has been passed upon. In the case at bar, the period dates from June 15, 1922. The citations in point are as follows:

> *K. W. Ignition Co.* v. *Tempco Electric Motor* (C. C. A. 6th, 1922), 283 F. 873.
> Interest was due on the amount of the royalty award for infringement from the date infringement ceased.

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*Cases referring to interest on recoveries in infringement cases: *Silsby* v. *Foote*, 20 How. (63 U. S.) 378, 386; *Mowry* v. *Whitney*, 14 Wall. 620 (81 U. S.), 653; *Littlefield* v. *Perry*, 21 Wall. (88 U. S.) 205, 229; *Parks* v. *Booth*, 102 U. S. 96, 106; *I. C. R. R. Co.* v. *Turrill*, 110 U. S. 301, 303; *Tilghman* v. *Proctor*, 125 U. S. 136, 160; *Crosby Valve Co.* v. *Safety Valve Co.*, 141 U. S. 441, 457; *Rubber Co.* v. *Goodyear*, 9 Wall. (76 U. S.) 788, 804; *Nat. Folding Box Co.* v. *Dayton Paper Co.*, 97 Fed 331, 332; *Oehring* v. *Fox Typewriter Co.*, 251 Fed. 584; *Superior Mach. Tool Co.* v. *Cincinnati Lathe & Tool Co.*, 284 Fed. 267, 269; *Dowagiac Mfg. Co.* v. *Deere & Webber Co.*, 284 Fed. 331, 351; *K. W. Ignition Co.* v. *Temco Elec. Motor Co.*, 283 Fed. 873, 880; *Merrell Soule* v. *Powdered Milk Co.* 7 Fed. (2d) 297, 300; *Consolidated Rubber Co.* v. *Diamond Rubber Co.*, 226 Fed. 455, 463.

Malleable Iron Range v. *Lee* (C. C. A. 7th, 1920) 263 Fed. 896.

Interest was due on damages recovered from the end of the infringing period.

Merrell Soule v. *Powdered Sugar* (C. C. A. 2d, 1924) 2 Fed. (2d) 107.

Interest on damages upon fixed royalty basis from time royalty would have been due.

National Tube v. *Mark* (C. C. A. 6th, 1926) 10 Fed. (2d) 430.

Interest on damages on fixed royalty basis calculated from date of infringement and same principal may be applied on a reasonable royalty.

Collins v. *Hupp* (C. C. A. 6th, 1927) 22 Fed. (2d) 27.

Interest on royalty award is allowable from date infringement ceased until final decree.

Muther v. *United Shoe Machinery* (U. S. D. C. Mass. 1927) 21 Fed. (2d) 773.

Where damages for an infringement are computed on reasonable royalties, interest is recoverable from date royalties should have been paid.

Rockwood v. *General* (C. C. A. 2nd, 1930) 27 Fed. (2d) 62.

Interest on award of damages for infringement of a patent on basis of reasonable royalty begins from date of last infringement.

National Brake v. *Christensen* (C. C. A. 7th, 1930) 38 Fed. (2d) 721.

In suit for infringement of patent, upon facts disclosed, interest should have been allowed from date of infringement.

Here, the court said:

> "To make the damaged party whole must be the object of the court in this, as in all other similar suits, where a money judgment or decree is the only remedy obtainable. This denial of interest for a period ranging from 10 to 20 years seems, on its face, unreasonable and unfair."

In this case, a five per cent. reasonable royalty was allowed.

The foregoing shows that there is no real conflict among the decisions of the Circuit Courts of Appeals.

C. If the claim be against the United States, as a special infringer, the petitioner is, we contend, still entitled to interest as a part of his reasonable and entire compensation.

So far as we are aware, this court has never passed on the matter of interest in a patent case, brought up from the Court of Claims, where a reasonable royalty has been allowed. Such interest was allowed by the Court of Claims in the *Richmond Screw Anchor* case, reported in 67 Court of Claims 63.

As to what this court has had to say on the subject of interest in analogous cases, we call the attention of the court to the case of *Phelps* v. *United States,* 274 U. S. 341, where interest was allowed and to the case of *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, where interest was not allowed, the decision being by a divided court, five justices being of the opinion that interest be not allowed and four taking a contrary view.

In the *Phelps* case, the United States did, arbitrarily and by its right of eminent domain, dispossess the petitioner from a dock and proceeded to take over the same for the benefit of the United States. The sub-

stance of the finding in this case was that where private property was requisitioned by the Secretary of War pursuant to an Act of Congress, just compensation, required under the Fifth Constitutional Amendment, included interest at a reasonable rate from the date of use to the time of payment, notwithstanding section 177 of the Judicial Code forbidding interest on claims against the government unless on express contract. It was held that acts of Congress are to be construed and applied in harmony with and not to thwart the purposes of the Constitution.

In the *Boston Sand and Gravel* case, it was stated, near the top of page 47:

> "We start with the rule that the United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution."

The court then went on to show that the particular suit was an admiralty collision suit governed by a special Act which did not provide for interest, and under these circumstances interest was not allowed.

The case at bar is one under the statute for a "reasonable and entire compensation." Reasonable and entire compensation must mean just compensation. Just compensation has been defined in the *Phelps* case as follows, beginning near the top of page 344:

> "Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of

> the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed."

It is the contention of this petitioner that the case at bar is a *Phelps* case and not a *Boston Sand & Gravel* case. It is a case of the appropriation of property by the government and not damages due to a collision governed by a special statute which does not provide for interest. The petitioner may be wrong in this contention. The matter is one that is open because it has not been settled by this court.

Conclusion.

It is respectfully submitted, in behalf of the petitioner, that this question, of great public importance, should no longer remain open and that this court should allow this petition so that the single law point raised by the established facts in this case may be settled.

Respectfully submitted,

O. Ellery Edwards,
Solicitor for Petitioner.

Dated, N. Y., June 19th, 1930.